facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S. Ct. at 2537 (emphasis in original). This Court said the same thing in *Ring*. 536 U.S. at 586 (the Sixth Amendment does not permit a defendant to be "exposed ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone").

However, *Apprendi*, *Ring*, and *Blakely* are of absolutely no moment here because the Texas special issues do not "increase[] the penalty for [capital murder] beyond the prescribed statutory maximum" in violation of the United States Constitution. *Apprendi*, 530 U.S. at 490. In this case, the elements of capital murder were indicted, submitted to the jury, and proven beyond a reasonable doubt as a prerequisite to reaching the punishment phase of Perry's trial. *See* 1 CR 12; 4 CR 589-97. And, once Perry's trial proceeded to the punishment phase, the special issues were submitted to the *jury* according to Texas law. TEX. CODE CRIM. PROC. art. 37.071 § 2(b) and (e); *see* 4 CR 599-65. Thus, Texas law did not improperly attempt to bypass the Sixth and Fourteenth Amendment rationale of *Apprendi/Ring/Blakely* in determining Perry's guilt and his "death eligibility."

Furthermore, to the extent that the Texas future dangerousness special issue is considered an "aggravating" factor, the Texas scheme completely satisfies the Sixth Amendment because, at the conclusion of the punishment phase of a capital trial, the jury is instructed to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," and the State is required to prove the issue beyond a reasonable doubt. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1) and (c). In the instant case, the jury was instructed in compliance with the statute and nothing else was required. *See* 4 CR 604.

The mitigation special issue likewise does not violate the Constitution because, although a Texas capital sentencing jury must specifically answer the mitigation special issue in the

negative to render a death sentence, *see* Petition at 21, the actual function of that special issue is plainly meant to inure to the defendant's benefit by allowing the jury an avenue to give effect to mitigating evidence. Thus, the Texas mitigation issue does not operate as the "functional equivalent of an element of a greater offense." *Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 494.

The capital punishment jurisprudence has traditionally recognized the distinction between aggravating factors and mitigating circumstances. In *Tuilaepa v. California*, this Court explained that there are "two different aspects of the capital decision making process: the eligibility decision and the selection decision." 512 U.S. 967, 971 (1994). To determine that an individual is eligible for the death penalty the jury must convict the defendant of murder and find one "aggravating circumstance" at either the guilt or punishment phase of trial. *Id.* at 972. "The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)," and may not be a factor applicable to every defendant convicted of murder. *Id.* The selection decision, however, serves an entirely different function. Here, the jury decides whether a defendant who is eligible for the death penalty should, in fact, receive that sentence. *Tuilaepa*, 512 U.S. at 972. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstance of the crime." *Id*, citing *Zant v. Stephens*, 461 U.S. 862, 879 (1983) (emphasis original).

Under Texas law, the mitigation special issue is not an element of the offense of capital murder nor is it an aggravating circumstance as defined by *Tuilaepa*. Rather it is the vehicle through which the jury is given the opportunity to make an individualized determination of the offender's moral culpability, as required by this Court. *See Penry v. Johnson*, 532 U.S. 782, 797 (2001); *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). In making the decision, the jury is instructed to consider all the

evidence, including the circumstances of the offense, the defendant's character and background, and general moral culpability of the defendant. TEX. CODE CRIM. PROC. art. 37.071 § 2 (e) & (f). The jury is not required to agree on what evidence supports an affirmative answer. TEX. CODE CRIM. PROC. art. 37.071 § 2 (e) & (f). Clearly, the mitigation issue confers upon the jury a broad ability to show leniency and *reduce* the defendant's sentence to life imprisonment. Thus, it is untenable that this special issue is equivalent to an aggravating factor which must be decided beyond a reasonable doubt.

Moreover, this distinction between aggravating factors and mitigating circumstances is expressly acknowledged in both the *Apprendi* and *Ring* decisions. In *Ring*, this Court emphasized that the defendant's claim was "tightly delineated" to the issue of whether the Sixth Amendment requires a jury finding on the aggravating circumstances asserted against him, and made no assertions with respect to mitigating circumstances. *Ring*, 536 U.S. at 597 n. 4. The Court's ultimate conclusion was limited accordingly. *Id.* at 609 (holding that *Walton v. Arizona*, 497 U.S. 639 (1990), was overruled to the extent that it "allows a sentencing judge, sitting without a jury, to find an *aggravating* circumstance necessary for the imposition of the death penalty," and that "[b]ecause Arizona's enumerated *aggravating factors* operate as the functional equivalent of an element of a greater offense, the Sixth Amendment required that they be found by a jury")(internal citations and quotations omitted).

Likewise, the *Apprendi* decision explicitly noted and reaffirmed the distinction between "facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 U.S. at 490 n. 16. There, the Court noted that where a judge finds a fact which allows a defendant to "escape the statutory maximum" attached to a jury verdict, that finding by a judge "neither expos[es] the defendant to a deprivation of liberty greater than that authorized by the verdict according to the statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the verdict

alone." *Id.* Similarly, in a concurring opinion joined by Justice Scalia, Justice Thomas pointed out that facts with the potential to mitigate punishment are not an element of a crime that might increase a sentencing decision. *Id.* at 501(Thomas, J. concurring, joined by Scalia, J.) Clearly, neither the *Ring* nor *Apprendi* holding contemplates extending the Sixth Amendment's "reasonable doubt requirement" to a capital jury's finding regarding mitigating evidence.

Equally important here is the portion of *Walton* left untouched by the majority in *Ring*, wherein the Supreme Court stated that the Eighth Amendment did not bar a state from imposing a burden of proof *on the defendant* to "establish, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 649-51. The Court noted that nothing in its Eighth Amendment jurisprudence precluded the state from "specifying how mitigating circumstances are to be proved." *Id.* at 649. Indeed, it noted that in several other capital cases, it found it constitutional for a state to impose a burden of proof on the defendant to prove issues such as self-defense, insanity, and "the affirmative defense of extreme emotional disturbance." *Id.* at 650; *see Martin v. Ohio,* 480 U.S. 228 (1987); *Patterson v. New York,* 432 U.S. 197 (1977); *Rivera v. Delaware,* 429 U.S. 877 (1976); *Leland v. Oregon,* 343 U.S. 790 (1952). The Court gleaned from these cases the following rule:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden to prove mitigating circumstances sufficiently substantial to call for leniency.

Walton, 497 U.S. at 650.

The practical implications of Perry's argument preclude the adoption of his reading of *Ring*. Prosecutors would be in the absurd position of proving a negative beyond a reasonable doubt. This is impossible under the Texas system in which jurors are left to decide what evidence is mitigating and whether that evidence suggests that mercy is appropriate, and where individual jurors need not agree on what evidence is mitigating when voting on this issue. Thus, not only would accepting Perry's assertion improperly extend *Apprendi* and *Ring* without basis and pervert much of this Court's Eighth Amendment jurisprudence, it would also be highly impractical.

Finally, it is important to note that the judge-versus-jury problem recognized in the *Ring/Apprendi/Blakely* cases is inapposite to the Texas capital sentencing scheme because the trial judge has no fact-finding role in a capital murder case under Texas law. Indeed, these cases do not address the Texas special issues nor the constitutionality of the Texas capital sentencing scheme. "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *See Texas v. Cobb*, 532 U.S. 162, 169 (2001).

Perry also argues for the first time that the Texas death penalty scheme violates his right to due process because it does not provide for meaningful appellate review of the mitigation special issue. Petition at 22. Relying on *Clemons v. Mississippi*, 494 U.S. 738 (1990), Perry argues that appellate review of the mitigation special issues is warranted because Texas is a "weighing state" in that it requires jurors to weigh the evidence when determining whether a life or death sentence is appropriate. Petition at 22-23. Apart from the fact that Perry has never raised this argument before, the kind of review Perry seeks is not constitutionally mandated.

Perry did not make this argument before the state court on direct appeal, therefore this Court is without jurisdiction to pass on it. The cases are legion that this Court will not decide issues raised

for the first time on petition for certiorari, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Therefore this Court is without jurisdiction to address this argument now and should deny certiorari for this reason.

Regardless, Perry's argument does not warrant certiorari review because Texas is not considered a "weighing state." *See Stringer v. Black*, 503 U.S. 222, 232-33 (1992) (citing to *Lowenfield v. Phelps*, 484 U.S. 231, 241-42 (1988)) (noting that Louisiana scheme, similar to Texas, does not require jury to weigh aggravating and mitigating factors). Therefore, the authority Perry cites is inapplicable. Furthermore, this Court has never held that the Constitution entitles a capital defendant to a particular type of appellate review, nor that an appellate court must re-determine the jury's verdict on punishment.[2] As a matter of state law, Texas has chosen to review the sufficiency of the evidence supporting the jury's affirmative response to the future dangerousness special issue under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See e.g., Hughes v. State*, 897 S.W.2d 285, 291 (Tex. Crim. App. 1994); *Livingston v. State*, 739 S.W.2d 311, 339-40 (Tex. Crim. App. 1987). Such a standard, with its emphasis on the rationality of the verdict, is more than adequate to ensure that the jury did not impose the death penalty arbitrarily or capriciously. *Cf. Lewis v. Jeffers*, 497 U.S. 764, 782 (1990). By providing prompt, judicial review of the jury's decision, "Texas has provided a means to promote the evenhanded, rational, and consistent

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[2] In fact, this Court upheld the constitutionality of the Texas capital sentencing scheme, including its provisions for appellate review, even though the statute is silent regarding the exact nature of the appeal. *Pulley v. Harris*, 465 U.S. 37, 53 n.15 (1984)(citing *Jurek v. Texas*, 428 U.S. 262, 269 (1976)).

imposition of death sentences under law." *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

No appellate review of the jury's answers to Texas' punishment-phase special issues is constitutionally required, because the Constitution permits standardless discretion to impose the death penalty once the defendant has been found eligible for a death sentence. *Cf. Tuilaepa v. California*, 512 U.S. 967 (1994). Under the Texas capital sentencing scheme, the jury's determination of guilt ensures that the defendant comes within the narrowed class of death-eligible defendants. *Jurek v. Texas*, 428 U.S. at 270. The jury then performs the "selection" function by determining whether the death-eligible defendant should in fact receive that sentence by answering the punishment phase special issues. Given that "complete jury discretion is constitutionally permissible" in the selection determination, *Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998), reviewing a Texas jury's selection decision is simply not constitutionally mandated. Once a defendant is determined to be death-eligible, the Eighth Amendment requirements for the selection decision are satisfied if the procedures "allow the jury to consider the character and record of the defendant and the circumstances of the crime." *Tuilaepa*, 512 U.S. at 972. In this regard, the Eighth Amendment's prohibition against arbitrary and capricious action in imposing the death sentence is not implicated by a lack of appellate review of the jury's "selection" determination. *Id.* at 979-80; *Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985). Accordingly, this Court has never held that the Constitution entitles a capital defendant to have a redetermination on appeal of the death sentence once properly found to be death-eligible. *See McCleskey v. Kemp*, 481 U.S. 279, 308 (1987); *Pulley v. Harris*, 465 U.S. 37, 45-46 (1984); *see and compare Lewis v. Jeffers*, 497 U.S. 764 (1990) ("eligibility" determination is reviewable; "If a State's aggravating circumstances adequately perform their constitutional function [the eligibility determination], then a state court's application of those circumstances raises, apart from due process and Eighth

Amendment concerns, only a question of the proper application of state law.").

Perry fails to set forth a compelling reason for granting certiorari review of his claim. Therefore, such review is unnecessary and should be denied.

III. Certiorari Review Should Be Denied Because the "Moral Blameworthiness" Definition of "Mitigating Evidence" Does Not Unconstitutionally Limit the Jury's Consideration of Evidence.

Perry argues that the supplemental jury instruction submitted pursuant to Tex. Code of Crim. Proc. Art. 37.071 § 2(f)(4), limiting mitigating evidence to that which a juror might regard as reducing a defendant's moral blameworthiness, unconstitutionally limits what mitigating evidence the jury may consider because it instructs jurors to consider some mitigating evidence but not all, in violation of *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*").[3] Perry argues that the jury may have disregarded his mitigation case because it equated "moral blameworthiness" with his already proven guilt, or could have concluded that his evidence of "family mental illness or drug and

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[3] Special Issue Two read as follows:

> Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, is there a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

4 CR 605. The jury was additionally instructed, in compliance with Art. 37.071 § 2(f)(4), that, "[i]n arriving at your answer, you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." 4 CR 601.

alcohol abuse had no bearing on his moral blameworthiness for the murder he committed." Petition at 28.

Perry raised this issue on direct appeal, relying on *Tennard v. Dretke*, 124 S. Ct. 2562 (2004). The state court properly overruled this point of error, concluding that it had previously decided that "the mitigation special issue 'does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness.'" *Perry*, 158 S.W.3d at 449 (citing *Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex. Crim. App. 1997)). The state court concluded that the *Tennard* decision, decided under another statutory scheme which did not include a mitigation special issue, does not hold otherwise. *Perry*, 158 S.W.3d at 449; *see Tennard*, 124 S. Ct. at 2569-72. Certiorari review of this decision is unnecessary because, by defining mitigation evidence as that which a juror considers to reduce a defendant's moral blameworthiness, Texas law does not offend the Constitution.

This Court has consistently held that "the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Tennard*, 124 S. Ct. at 2570 (citing *Boyde v. California*, 494 U.S. 370, 377-378 (1990)); *see also Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death .... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings*, 455 U.S. at 114). The mitigating value of constitutionally relevant evidence, as actually proffered at trial, must be within "the effective reach" of the jury in responding to the statutory punishment issues and instructions. *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Graham v. Collins*, 506 U.S. 461, 475 (1993).

Although relevant mitigating evidence may not be placed beyond the effective reach of the sentencer, the Constitution does not require unfettered sentencing discretion in the jury, and a state may guide the sentencer's consideration of mitigating evidence in an effort to achieve a more rational and equitable result. *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *Tuilaepa v. California*, 512 U.S. 967, 971(1994); *Johnson,* 509 U.S. at 362. Thus, there is no requirement that a jury be allowed to give effect to mitigating evidence *in every conceivable manner in which the evidence might be relevant. Johnson*, 509 U.S. at 372. If mitigating evidence is within the effective reach of the jury, the fact that a defendant can identify mitigating value beyond the scope of the statutory issues does not require the submission of an additional issue or instruction allowing the jury to give further mitigating effect to the evidence. *Id.*; *Graham*, 506 U.S. at 474; *see also Boyde,* 494 U.S. at 382 n.5 (defendant is entitled only to fair vehicle by which sentencer can give effect to mitigating force of his evidence). Mitigating evidence is beyond the effective reach of the sentencer only if there exists a "reasonable likelihood that t[he] jurors would have deemed themselves *foreclosed* from considering [the mitigating evidence]" in answering the special punishment issues submitted to the jury. *Johnson*, 509 U.S. at 369 (emphasis added); *see Penry I,* 492 U.S. at 315-29 (jury was prevented from giving *any* mitigating effect to the evidence); *see also Saffle v. Parks*, 494 U.S. 484, 491-92 (1989) (same). The defect identified in *Penry I* and again in *Penry II* was that the jury was prevented from giving *any* mitigating effect to the evidence. *See Saffle*, 494 U.S. at 489; *Penry II,* 532 U.S. at 800. This defect did not occur in Perry's case.

It is entirely possible for the jury to find, under the mitigation instruction given, that any evidence of "family mental illness or drug and alcohol abuse" reduced Perry's moral blameworthiness for the crime. The jury could have concluded that the crime was the result of those influences and he was, thus, not morally culpable for his behavior. This Court has recognized that "virtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability'

apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham v. Collins*, 506 U.S. 461, 476 (1993).

Perry speculates that the jury improperly disregarded this evidence because the jury may have concluded that the evidence had no bearing on his moral blameworthiness. Petition at 28. However, the fact that the jury ultimately concluded that none of his mitigating evidence was sufficient to reduce his moral blameworthiness does not mean that the jury was precluded from considering such evidence. Indeed, it does not appear that Perry actually suffered from mental illness, or that he was under the influence of drugs and alcohol at the time of the crime, *see* Petition at 28 n.106, thus the jury could have concluded that it was not relevant to Perry's moral blameworthiness for this crime. This Court has recognized in *Skipper v. South Carolina* that not everything a defendant introduces in mitigation of punishment is "relevant mitigating evidence." 476 U.S. 1, 7 n.2 (1986). Evidence of a defendant's character or background attains constitutionally mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character or background proffered in mitigation of punishment:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse .... Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (quoting *California v. Brown*, 479 U.S. 538, 545

(1987) (emphasis in original)); *see also Penry I*, 492 U.S. at 319 (noting that it is well settled that "punishment should be directly related to the personal culpability of the criminal defendant . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.") (citation omitted); *Saffle*, 494 U.S. at 492-93 (holding that "[i]t is no doubt constitutionally permissible, if not constitutionally required . . . for the State to insist that the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence.") (internal citations and quotes omitted).

While the jury may have found his evidence unpersuasive, Perry has failed to prove that the jury was precluded from considering it, or that the jury simply disregarded it. This Court has previously approved the mitigation special issue as currently worded, *see Penry II*, 532 U.S. at 803, and made no mention of fault in the supplemental instruction. Therefore, certiorari review of this claim is unwarranted.

CONCLUSION

For the foregoing reasons, the Court should deny Perry's petition for writ of certiorari.

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In The
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MICHAEL JAMES PERRY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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ARGUMENT

This Court has never directly addressed the question of whether a jury must be certain, beyond a reasonable doubt, that a death sentence is appropriate before deciding to impose it. Texas' Opposition omits any discussion of this central point.

Texas leads the nation in the number of executions since this Court reinstated the death penalty in 1976.[1] Numerous decisions by this Court over the last thirty years have dramatically changed the way in which the government may impose the death sentence. All those changes, at their core, are concerned with ensuring that the jury is certain beyond a reasonable doubt that death is the appropriate sentence.

This level of certainty is not demanded under the current Texas capital sentencing procedure, which treats a defendant's mitigating evidence as an afterthought. The Texas system gives no guidance to the jury as to what burden of proof applies to the mitigation question, allows poor jury instructions that further undermine the jury's consideration of mitigating factors, and provides no appellate review of the manner in which the jury treats the mitigating evidence. Such a situation virtually guarantees that the application of the death penalty in Texas will be freakish, wanton and arbitrary. In this case, the Texas scheme denied Michael James Perry his right to have the jury fully and fairly consider the mitigating evidence that should have resulted in a sentence of life imprisonment instead of death.

A. Texas' Mitigation Issue Is Unconstitutional

1. Texas Fails To Demand That Jurors Be Certain About Their Decision On the Mitigation Special Issue

Texas' principle response to the Petition is that mitigating evidence should not and cannot be subject to any standard of presentation, proof or review. This response is

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[1] Texas Department of Criminal Justice Statistics, http://www.tdcj.state.tx.us/stat/drowfacts.htm (last visited August 20, 2005).

wrong as a matter of experience and principle. On the practical level, of the thirty-one states that require the jury to engage in a comparison of the aggravating and mitigating circumstances at the sentencing stage, sixteen of those states also require that the jury be certain, either beyond a reasonable doubt (fourteen states) or by a preponderance of the evidence (two states), that the mitigating factors do not warrant a sentence of life imprisonment.[2] Those states have gotten it right as a matter of constitutional principle.

The reasonable doubt standard is an instructional concept aimed at conveying to the jury the level or degree of subjective certitude that it must have in order to render a verdict in favor of the party with the burden of proof. The standard of proof represents an attempt to instruct the jury on the degree of confidence our society thinks it should have in the correctness of its conclusions. The standard also allocates the risk of error between the litigants, indicates the relative importance of the ultimate decision, minimizes the risk of error, and gives the jury guidance regarding the sense of the solemnity of the task and the degree of certitude that it must have in order to reach a certain decision. As this Court has noted, the greater the social cost of an erroneous outcome in a particular type of litigation, the higher the standard of proof the law applies to that litigation.[3]

Texas argues that specific standards for balancing aggravating and mitigating circumstances are not constitutionally required.[4] This contention misses the point, however, because it does not address the burden of proof issue or the demand for certainty underlying in the burden requirement. The question is what level of *certitude* the jury must have in reaching its conclusion. Texas' argument for total jury discretion[5] amounts to a return to the unfettered and "openended

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[2] *See infra* note 25.

[3] *Furman v. Georgia*, 408 U.S. 238, 306 (1972) ("[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.").

[4] Opposition, 11-12.

[5] Opposition, 7-10.

discretion in capital sentencing that began in the 1960's and [should have] culminated in *Furman v. Georgia*."[6]

2. The Jury Must Answer Texas' Mitigation Issue Negatively Before It May Impose A Death Sentence

A jury must make three findings under Texas' death penalty statute: 1) the defendant is guilty of a capital offense; 2) the defendant will be a continuing threat to society; and 3) the mitigating factors are not sufficient to warrant a sentence of life imprisonment.[7] The first two findings must be proven by the state beyond a reasonable doubt.[8] The mitigation special issue places no burden on the state and provides no instruction to the jurors about the level of certainty they need to have in their conclusion.[9]

Texas initially argues that a defendant is already eligible for the death sentence by the time the jury reaches the mitigation special issue, and therefore, no burden is required.[10] This is wrong. The jury may impose a sentence of death *only* if it answers the mitigation issue negatively. If the jury cannot reach a decision on the mitigation special issue, then the court *must* sentence the defendant to life imprisonment.[11] As in *Ring*, if the jury reaches a negative finding on mitigation special issue, then the

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[6] *See* Carol S. Steiker and Jordan M. Steiker, *Let God Sort Them Out? Refining The Individualization Requirement In Capital Sentencing Crossed Over: A Murder, A Memoir. By Beverly Lowry*, 102 Yale L. J. 835, 863-64 (1992) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)); Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent at 69, *McGautha v. California*, 402 U.S. 183 (1971) (No. 203) (In the words of the NAACP Legal Defense Fund, " 'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language.").

[7] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (Vernon Supp. 2004-05).

[8] *Id.* at § 2(c).

[9] *Id.* at § 2(e)(1).

[10] Opposition, 3.

[11] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(g).

defendant is exposed "to a greater punishment than that authorized by the [jury's] guilty verdict."[12] The mitigation issue thus is similar to the finding of "deliberate cruelty" required by *Blakely v. Washington* to be made by a jury beyond a reasonable doubt.[13] As this Court noted in both *Ring* and *Apprendi*, the proper inquiry into this issue is "one not of form, but of effect."[14]

Texas further claims that the mitigation special issue requires no burden of proof because it is not a factual determination.[15] Yet other courts that have addressed this issue have disagreed with Texas' assessment.[16] Nevada, for instance, requires a finding regarding the weighing of mitigating circumstances before the jury may impose a sentence of death.[17] The Nevada Supreme Court concluded that the mitigation finding is, in part, a factual determination, not merely discretionary weighing, and *Ring* therefore requires a jury to make this finding beyond a reasonable doubt.[18]

Texas also argues that it is impossible to impose a burden of proof on the mitigation issue and that it would be "in the absurd position of proving a negative beyond a reasonable doubt."[19] But at least one Texas court provided the correct instruction before the Legislature intervened

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[12] *Ring v. Arizona*, 536 U.S. 584, 586 (2002).

[13] 124 S. Ct. 2531, 2537 (2004).

[14] *Ring* at 604 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 541 (2000) (O'Connor, J., dissenting)).

[15] *See* Opposition, 7.

[16] *See State v. Cole*, 155 S.W.3d 885, 904 (Tenn. 2005) (treating question whether aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt as "factual questions that determine whether the maximum sentence of death will be imposed").

[17] *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) ("This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing.").

[18] *Id.*

[19] Opposition, 10.

and passed Section 37.071 § 2(e)(1).[20] The same burden-shifting scheme already exists in many states for affirmative defenses as well.[21] This question is not unique to Texas' death penalty scheme.

The Connecticut Supreme Court, for example, has held that a jury must be certain, beyond a reasonable doubt, that the aggravating factors outweigh the mitigating factors by any amount or degree.[22] The Court concluded that the jury, in examining the aggravating and mitigating factors, is "in effect deciding that death is the appropriate punishment in the case."[23] The Colorado Supreme Court likewise reasoned that the purpose of requiring proof beyond a reasonable doubt is to convey to the jurors "the degree of confidence they must have in the correctness of their ultimate conclusion before they can return a verdict doubt."[24] Thus, many states[25] and federal

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[20] *Ex parte Steven Kenneth Staley*, 160 S.W.3d 56, 59 n.6 (Tex. Crim. App. 2005) ("[T]he jury was explicitly required to find, *beyond a reasonable doubt*, that, even after considering all mitigating evidence and applicant's level of culpability, the penalty of death was still the 'appropriate punishment.' The jury was informed that any reasonable doubt must be resolved in applicant's favor.").

[21] *See Olsen v. State*, 67 P.3d 536, 590 (Wyo. 2003) ("If the jury is to be instructed to "weigh," the defendant must produce proof of mitigating circumstances; however, just as in affirmative defenses, the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State.").

[22] *State v. Rizzo*, 833 A.2d 363, 410-11 (Conn. 2003).

[23] *Id.*

[24] *People v. Tenneson*, 788 P.2d 786, 796 (Colo. 1990).

[25] ARK. CODE ANN. § 5-4-603(a)(2) (2005); *Tenneson*, 788 P.2d at 796; *Rizzo*, 833 A.2d at 410-11; *State v. Whitfield*, 107 S.W.3d 253, 259-60 (Mo. 2003); *Johnson*, 59 P.3d at 460; *State v. McDougall*, 301 S.E.2d 308, 326 (N.C. 1983); N.J. STAT. ANN. § 2C:11-3(c)(3)(a) and (b) (2005); N.Y. CRIM. PROC. LAW § 400.27(11)(a) (2005); OHIO REV. CODE ANN. § 2929.03(D)(1) (2005); TENN. CODE ANN. § 39-13-204(g)(1)(B) (2005); UTAH CODE ANN. § 76-3-207(5)(b) (2005); WASH. REV. CODE § 10-95-060(4); *Olsen*, 67 P.3d at 590.

courts[26] have imposed a burden of proof on the mitigation issue because to do otherwise relieves the government of its burden.

3. Texas Conducts No Appellate Review of the Mitigation Special Issue

Of the 253 death penalty direct appeals decided by the Texas Court of Criminal Appeals from 1999 to 2004, only 4 were reversed or remanded – and none were reversed or remanded because of any concern about the jury's finding on mitigating evidence.[27] Texas has basically abdicated its responsibility to review death penalty sentences when it comes to the mitigation special issue.[28] The State's only response is that it is not a weighing state and, even if it were a weighing state, standardless review (*i.e.*, no review) is allowed once the defendant has been found guilty of a capital offense.[29]

This response comes despite the State's assurances in *Jurek* that the Texas courts' "prompt judicial review of the jury's decision" would provide the "means to promote the

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[26] *See United States v. Sampson*, 335 F. Supp. 2d 166, 238-39 n.42 (D. Mass. 2004) (imposing reasonable doubt standard on prosecution in weighing process). The district court in *Sampson* noted:

> The lower courts are split on whether to instruct that the government must prove beyond a reasonable doubt that the death penalty is justified. The defendant cited cases in which the instruction was given and the government cited cases in which it was not. Judge Sand's model jury instructions contain "beyond a reasonable doubt" language while the Eighth Circuit's model jury instructions do not. *See* 1 Leonard B. Sand *et al.*, Modern Federal Jury Instructions, Inst. 9A-19 at 9A-78 to -79; Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction 12.11.

[27] *See* Texas Judicial System Annual Report, Office of Court Administration and the Texas Judicial Council, http://www.courts.state.tx.us/oca/PublicInfo/annual_reports.asp (last visited August 20, 2005).

[28] Petition, 17.

[29] Opposition, 11-12.

evenhanded, rational, and consistent imposition of death sentences under law."[30] This review cannot be perfunctory: "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision."[31] But today, all review in Texas is absent.

Texas' argument that it is not required to conduct any appellate review because Texas is not a weighing state is contradicted by its characterization of Section 37.071 § 2(e)(1) in its prior briefing.[32] In its Opposition, Texas relies on *Stringer v. Black* and *Lowenfield v. Phelps*,[33] but fails to acknowledge that in both cases the Court was referring to the Texas statute as it existed prior to 1991, when the Texas Legislature added Section 37.071 § 2(e)(1) in response to *Penry I*. The mere fact that Texas chooses not to use the word "weigh" in its statute does not mean that Texas is not a weighing state.[34] Even prior to Texas adding Section 37.071 § 2(e)(1), this Court concluded that there was no practical difference between those states that explicitly require the jury to "weigh" the factors and the Texas scheme.[35]

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[30] *Jurek v. Texas*, 428 U.S. 262, 266 (1976).

[31] *Tuilaepa v.* California, 512 U.S. 967, 973 (1994).

[32] Against its current approach, Texas argued in the Court of Criminal Appeals that "[t]he weighing process required by the mitigating issue is purely judgmental and no burden of proof is required." Appellate Brief to the Court of Criminal Appeals, 57-60.

[33] Opposition, 11 (citing *Stringer v. Black*, 503 U.S. 222 (1992), and *Lowenfield v. Phelps*, 484 U.S. 231 (1988)).

[34] Petition, 22-23; *see Richmond v. Lewis*, 506 U.S. 40, 47 (1992) (Arizona was a weighing state, despite the fact that the term "weighing" was not included in the statute); *Olsen*, 67 P.3d at 572-73. *See* ARIZ. REV. STAT. ANN. § 13-703(E) (1989) ("In determining whether to impose a sentence of death . . . the court shall take into account the aggravating and mitigating circumstances included in . . . this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency.").

[35] *Franklin v. Lynaugh*, 487 U.S. 164, 183 n.12 (1988) ("We also repeat our previous acknowledgment, that – as a practical matter – a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it

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